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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOSE AYALA,

Plaintiff and Appellant,

v.

LOS ANGELES CITY COLLEGE,

Defendant and Respondent.

B187997

(Los Angeles County
Super. Ct. No. BC321567)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mary Ann Murphy, Judge. Affirmed.

Jose Ayala, in pro. per., for Plaintiff and Appellant.

Office of General Counsel Los Angeles Community College District, Camille A.
Goulet, Kevin D. Jeter, Anne L. Diga and Eric C. Kim for Defendant and Respondent.

Appellant Jose Ayala appeals from the judgment of dismissal following the trial court's sustaining respondent's demurrer to appellant's operative fourth amended

complaint without leave to amend.¹ A student at Los Angeles City College (LACC), appellant filed five complaints against respondent Los Angeles Community College District, erroneously named as LACC, based on (1) allegations of fraud in LACC's denial of a federal student financial aid loan and (2) violation of the Unruh Civil Rights Act. He represents himself on appeal as he did in the trial court and, although his opening brief is difficult to follow, argues that he complied with the Tort Claims Act, non-compliance with which was a ground relied on by the trial court to sustain respondent's demurrer. Concluding that the demurrer was properly sustained, we shall affirm the judgment of dismissal.

PROCEDURAL HISTORY

Appellant, representing himself, filed four complaints prior to this one. He did not include the operative complaint in his record on appeal, which would be a sufficient ground to affirm the appeal. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [failure to provide an adequate record on an issue requires that the issue be resolved against plaintiff].) Appellant failed to include other relevant documents, including earlier complaints and rulings, respondent's demurrer, and the order denying his motion for reconsideration. We granted respondent's request for judicial notice of many of those documents that were before the trial court.²

The fourth amended complaint alleged various misrepresentations by the individual defendants, the financial aid technician at LACC, and LACC's vice-president of student affairs, both acting within the scope of their employment and authority for respondent. Paragraph 10 alleged appellant complied with presentation of requirements of the California Tort Claims Act on May 19, 2004 and cited Exhibit C, which is not attached to our copy of the operative complaint.

¹ As respondent points out, several of the other orders and rulings purportedly appealed are from nonappealable orders.

² Appellant thereafter filed a request for judicial notice of parts of the administrative record when he filed his reply brief.

The alleged misrepresentations were that the decision not to approve appellant's loan request for the 2003-2004 award year was because "You are a transfer student and have two or more years of loan or its equivalent appearing on your Student Aid Report (SAR)" and "no mailing address provided" and, regarding appellant's appeal of that decision, "Your record shows that you have attended various universities for at least five years (10 semesters) since 1995, [not] including summer sessions, during which times you received over [\$40,000] in subsidized, unsubsidized and Perkins loans." Appellant alleged the true facts were that he received \$39,255 in such aid at the time of disapproval and that defendants had no reason to believe appellant's aggregate loan history was over the federal aggregate loan limit regulations; he did not deny the other representations.

Appellant alleged the misrepresentations were made with intent for him to rely on them; he did rely on them; he was induced not to receive his federal student loan; he lived without proper housing, dental and medical care for the 2003-2004 academic year, and he was damaged in the sum of \$15,000. Regarding the second cause of action for violations of the Unruh Civil Rights Act, appellant alleged that defendants denied him full and equal accommodations, advantages, facilities, privileges and services. LACC's motivating reason was alleged to be "its perception of [appellant's] eligibility for student aid and disability." Appellant sought exemplary as well as actual damages.

Respondent's demurrer alleged appellant had not pleaded compliance with the filing requirements of the Tort Claims Act; had not stated sufficient facts to support a cause of action for negligent misrepresentation; the individual employees are immune for negligent misrepresentation; the District is immune for negligent misrepresentation pursuant to Government Code section 818; appellant failed to file a tort claim relating to the Unruh Civil Rights Act; he has not stated sufficient facts to support the second cause of action, and he has not exhausted his administrative remedies as to all causes of action. The District further claimed that the individual defendants had been improperly added without an order from the court and that they had not been properly served.

The trial court denied appellant's motion for reconsideration and ruled respondent is immune as to the first cause of action and appellant did not submit a tort claim relating

to the Unruh Act. The demurrer having been sustained without leave to amend, the trial court dismissed the action and ordered that appellant take nothing by his fourth amended complaint. Appellant filed several notices of appeal, some from nonappealable orders, and named only LACC as respondent.

DISCUSSION

1. Standard of review.

The standard of review from orders of dismissal following the sustaining of demurrers is well established: “[A]n appellate court treats the demurrer as admitting all material facts properly pled and matters subject to judicial notice, but not deductions, contentions, or conclusions of law or fact. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171].) We also read the complaint as a whole and its parts in context, giving it a reasonable interpretation. (*Ibid.*) When a demurrer is sustained, we determine if the complaint states facts sufficient to constitute a cause of action. When it is sustained without leave to amend, we decide if there is a reasonable possibility that the defect can be cured by amendment. If so, the trial court abused its discretion, and the judgment is reversed. The plaintiff bears the burden of proving the reasonable possibility of cure. (*Ibid.*)” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

The general rule of liberal construction of the complaint is different, however, when the causes of action are for negligent misrepresentation or for fraud, as in the first cause of action alleged the case at bench. “The policy of liberal construction of pleadings is not generally invoked to sustain a misrepresentation pleading defective in any material respect.” (*Cadlo v. Owens-Illinois, Inc., supra*, 125 Cal.App.4th 513, 519.) Furthermore, “the mere assertion of ‘reliance’ is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance.” (*Ibid.*)

Where, as here, sustaining the demurrer to the third amended complaint was followed by an almost identical fourth amended complaint³ and plaintiff has had several opportunities to improve his pleading, the rule of liberal construction fails for that reason as well. The court may presume there is no reasonable possibility any defects can be cured. (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585 [“When a plaintiff elects not to amend the complaint, it is presumed that the complaint states as strong a case as is possible”]; see generally 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading § 410, pp.507-508.)

Moreover, appellant representing himself “is entitled to the same, but no greater, consideration than other litigants and attorneys. [Citations.]’ (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638 [.] . . . A pro. per. litigant is held to the same restrictive procedural rules as an attorney. (*Nelson v. Gaunt, supra*, 125 Cal.App.3d at pp. 638-639.)” (*Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 193; accord *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 [“as is the case with attorneys, pro. per. litigants must follow correct rules of procedure”].)

2. The cause of action for fraud is abandoned.

Appellant does not argue the fraud cause of action on appeal. He therefore has abandoned that issue. (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 293, fn. 3.) Thus, we need not decide if respondent as a public entity is immune pursuant to Government Code section 818.8, i.e., whether misrepresentation resulting in denial of appellant’s application for student financial aid constitutes “the kind of ‘commercial or financial transactions’ that give rise to the application of section 818.8 as interpreted by the California Supreme Court in *Johnson v. State of California* (1968) 69 Cal.2d 782.” (*Burden v. County of Santa Clara* (2000) 81 Cal.App.4th 244, 248.)

³ Appellant merely crossed out “Third;” added a handwritten “Fourth;” and crossed out the name and allegations concerning one of the named defendants, who in the third amended complaint was alleged to be the dean of the LACC student aid loan department; and penciled in new dates of filing.

3. *The cause of action for violation of the Unruh Civil Rights Act.*

Not until appellant's reply brief and his accompanying request for judicial notice of what he claims to be the administrative record does appellant refer to any part of the record that is relevant to his argument regarding the validity of his motion for summary judgment. Such lack of support generally waives the issue. (*Nowosu v. Uba, supra*, 122 Cal.App.4th 1229, 1246.)

In any event, appellant failed to state a cause of action under the Unruh Civil Rights Act. As explained in *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795, “to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.” There is no exemption from the claim filing requirement for the Unruh Act Civil Rights act when the primary relief sought is monetary damages. (*Bates v. Franchise Tax Bd.* (2004) 124 Cal.App.4th 367, 384, citing *Gatto v. County of Sonoma* (2002) 98 Cal. App. 4th 744, 763.)

Neither appellant's pleadings nor other documents in the record on appeal establish he filed a timely claim *based on the Unruh Civil Rights Act*. Moreover, there is no clue in the complaint about the nature of any claimed disability, and appellant's “eligibility for student aid” is not a specific classification protected by Civil Code section 51, subdivision (b), which currently includes “sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status [and] sexual orientation” as “entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”

4. *Appellant's motion for summary judgment.*

Appellant contends that his motion for summary judgment was erroneously denied but included no such motion in the clerk's transcript. Appellant's request for judicial notice in this court, filed the same date as his reply brief, does contain a motion for summary judgment, dated September 23, 2005, with a hearing date scheduled for January 10, 2006.

First, it is completely unfair to respondent to provide these materials after respondent's brief has been filed. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [““Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant,”” citing *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) No good reason that might excuse the delay is presented in the case at bench. (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022.)

In addition, the judgment of dismissal was entered before the date scheduled for hearing the summary judgment motion. The notice of ruling on the demurrer was filed December 2, 2005; a notice of ruling filed January 9, 2006, ordered that all future dates be vacated. With the demurrer sustained without leave to amend, unless appellant can establish that the demurrer should have been overruled, the summary judgment motion would be moot. In addition, except for the vacation of future dates, we see no order either denying or granting summary judgment.

Finally, appellant provided only two undisputed facts to support his motion for summary judgment: (1) “The plaintiff is eligible to receive student loan” and (2) “The defendants lied and denied the Plaintiff loan eligibility.” Even if the summary judgment motion was properly filed and should have been considered, those facts are insufficient to support the causes alleged in the fourth amended complaint.

DISPOSITION

The judgment (order of dismissal) is affirmed.

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COOPER, P. J.

We concur:

BOLAND, J.

FLIER, J.